Kevin J. McInerney, Esq., SBN 46941
Kelly McInerney, Esq., SBN 200017
Charles A. Jones, Esq., SBN 224915
McINERNEY & JONES
18124 Wedge Parkway #503
Reno, NV 89511
Telephone: (775) 849-3811
Facsimile: (775) 849-3866

James F. Clapp, Esq. SBN 145814
DOSTART CLAPP & COVENEY LLP
4370 La Jolla Village Dr., Suite 970
San Diego, CA 92122
Telephone: (858) 623-4200
Facsimile: (858) 623-4299

Matthew Righetti, Esq. (121012)
RIGHETTI GLUGOSKI, P.C.
456 Montgomery St., Suite 1400
San Francisco, CA 94101
Telephone: (415) 983-0900
Facsimile: (415) 397-9005

Attorneys for Intervenor NYKEYA KILBY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CHAD AARON BERKE, individually and on behalf of all others similarly situated,

Plaintiff,

v.

CVS PHARMACY, INC.,

Defendant.

CASE NO. 11-CV-03388-SVW-JEM

REPLY MEMORANDUM OF PROPOSED INTERVENOR NYKEYA KILBY RE MOTIONS TO INTERVENE AND DISMISS

Date: September 12, 2011
Time: 1:30 p.m.
Courtroom: 6

Hon. Stephen V. Wilson

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I.
CVS AND ITS COUNSEL VIOLATED THE LOCAL RULES OF TWO DISTRICTS IN CONCEALING THE EXISTENCE OF DUPLICATIVE ACTIONS

Michael Weil, counsel for CVS, states in the first footnote of his Opposition that he had "no duty under the Federal Rules or the local rules to inform the Court of *Kilby*." Doc. 30, p. 4, fn. 1. However, Local Rule 7.1 requires all non-governmental parties to:

> "file with their first appearance an original and two copies of a Notice of Interested Parties which shall list all persons, associations of persons, firms, partnerships and corporations (including parent corporations clearly identified as such) which may have a pecuniary interest in the outcome of the case."
> (emphasis added)

Proposed Intervenor Nykeya Kilby certainly has a pecuniary interest in the outcome of the *Berke* action because, as defendant concedes, she stands to recover statutory penalties. An examination of the *Berke* docket shows that the Certification and Notice of Interested Parties (Local Rule 7.1-1) filed on April 20, 2011 by Michael Weil contains no mention of the *Kilby* action which Mr. Weil had been actively defending for two years. Doc. 2. Beyond Local Rule 7.1, of course, there is an old fashioned rule that attorneys are to be candid in their dealing with courts.

Under Local Rule 40.1(e) of the Southern District of California, CVS had a duty and obligation immediately upon service of the *Berke* action to disclose its existence to not only the Southern District, but to counsel in both cases. Local Rule 40.1(e) reads as follows:

> **Notice of Related Case, Duties of Counsel.** Whenever counsel has reason to believe that a pending action or proceeding on file in this or any other federal or state court (whether pending, dismissed, or otherwise terminated), counsel must promptly file and serve on all known parties to each related action or proceeding a notice of related case, stating the title, number and filing date of each action or proceeding believed to be related, together with a brief statement of their relationship and the reasons why assignment to a single district judge is or is not likely to effect a saving of judicial effort and other economies. The clerk will promptly notify the court of such filing. This is a continuing duty that applies not only when counsel files a case with knowledge of a related action or proceeding but also applies after the date of filing whenever counsel learns of a related action or proceeding.
>
> (emphasis added)

Counsel for CVS certainly learned of the *Berke* suit after it was filed in the Superior Court in late January. Yet no notice of related case has ever been filed in the Southern District by CVS (the docket sheet in *Kilby* was attached to her moving papers as Exhibit J to the Declaration of Kevin J. McInerney).

The reason, of course, that CVS's counsel suffered an ethical lapse and violated the local rules of two districts is that they are hell bent to take advantage of Mr. Berke, an inadequate class representative, and his copycat counsel. The extent to which they would go is seen in the weasel wording in the declaration of attorney Weil. To claim that Kilby's motions are untimely, Mr. Weil states at paragraph 17:

> "In or around April 2011, I had a conversation with Marita Lauinger, counsel for Kilby, about the *Kilby* case. I mentioned to Ms. Lauinger that other law firms were filing similar suitable seats actions against the same defendants and the complaints looked similar to the Kilby complaint. Ms. Lauinger acknowledged that she was aware of them." Doc. 30-1, ¶17.

Parse his language carefully and one sees attorney Weil never says that he actually told one of the *Kilby* attorneys that another action was pending in a particular court alleging seating violations against CVS, or that this case was *Berke*, or that CVS was in the process of removing it to the Central District, or that Berke's attorney was one Carney Shegerian of Los Angeles. Mr. Weil's statement is a minor monument to the kind of weasel wording that causes lawyers to be held in poor regard. Certainly, Ms. Lauinger didn't glean much from his ambiguous comment:

> "Since he did not mention any specific case, I understood his comment simply to note that the area of law had been expanding beyond those cases filed by my firm and my co-counsel… None of CVS Pharmacy's attorneys, Weil, Long, or Moss ever advised me that the *Berke v. CVS Pharmacy, Inc.* case was pending." Declaration of Marita M. Lauinger, ¶¶2, 3.

The repeated use of the plural by attorney Weil provides confirmation of her recollection:

> "In or around April 2011, I had a conversation with Marita Lauinger, counsel for Kilby, about the Kilby case. I mentioned to Ms. Lauinger that other law firms were filing similar suitable seats actions a gainst the same defendants a nd the complaints l ooked similar to the Kilby complaint. Ms. Lauinger acknowledged that she was aware of them." Doc. 30-1, ¶17.

Only one firm, Shegerian & Associates, Inc., not multiple firms, had filed an action against CVS, a single defendant.

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II.
BERKE IS NOT CONTESTING DISMISSAL

Counsel for Mr. Berke has filed in response to Ms. Kilby's motion a statement of non-opposition to a stay of the Berke suit (Doc. 33). Just as Mr. Shegerian did in *Rodriguez v. Target*, counsel for Berke does not file any opposition to Kilby's motion to dismiss. *Rodriguez v. Target Corporation*, Case No. 11-CV-04628 SVW (JCx).

Beyond this, Mr. Shegerian has sent to one of Kilby's counsel an e-mail explaining that he is seeking to dismiss *Berke*: "We offered to dismiss the Berke matter without prejudice in exchange for a waiver of costs but defendant has not agreed to the same as of the present date." Ex. A to McInerney Declaration.

The fact that counsel for CVS has not accepted a dismissal by Mr. Berke confirms their motive for concealing *Kilby*. The fact that Mr. Shegerian sent this e-mail to one of Ms. Kilby's counsel is perhaps more puzzling.

III.
IT IS INCORRECT THAT *BERKE* IS MORE ADVANCED THAN *KILBY*

CVS Counsel has rushed in *Berke* to file a motion for summary judgment motion showing that Mr. Berke is ill suited as a shift supervisor to represent employees whose "nature of work" would reasonably allow the use of a seat (Wage Order 7-2001, §14) and that Mr. Shegerian is not particularly well suited to represent a federal class. It appears that virtually no discovery has been done beyond Berke's own deposition, and no dispensation has been given from Local

Rule 23-3, and Berke's counsel believes Rule 26 disclosures are to be filed with the court (Doc. 10).

CVS wants summary judgment against Mr. Berke not so much to end his individual claim, but to end *Kilby*. Any grant of summary judgment will likely impact that class Kilby seeks to represent. The California Supreme Court has made clear that because an aggrieved employee acts only as an agent or proxy of the State under PAGA, any judgment will be binding upon the State and all other aggrieved employees:

> "As we will explain, a representative action brought by an aggrieved employee under the Labor Code Private Attorneys General Act of 2004 does not give rise to the [one way intervention] due process concerns that defendants have expressed, because the judgment in such an action is binding not only on the named employee plaintiff but also on government agencies and any aggrieved employee not a party to the proceeding." *Arias v. Superior Court*, 46 Cal.4th 969, 985 (2009); 95 Cal.Rptr.3d 588, 600.

Although CVS takes the position that "Kilby has no protectable interest and disposition of this action will not impair or impede her ability to protect any interest" (Opposition, page 6, lines 17-18), it later contradicts this by admitting that Kilby's motion to intervene and dismiss is an attempt "to prevent a potentially dispositive ruling that may foreclose her case." (Doc. 30, p. 10:13-14).

To evade dismissal under the first-to-file rule, counsel for CVS distorts the comparative status of the two cases. After Judge Lorenz issued his lengthy opinion denying CVS's motion to dismiss in *Kilby* (Ex. B to McInerney Declaration), CVS

has thwarted discovery, as explained by Marita Lauinger in her declaration (¶6). And with respect to the claim that *Kilby* counsel somehow prevented CVS from pursuing summary judgment, that is obviously beyond plaintiff's control and, actually, in February, Judge Bencivengo, "advised Mr. Weil that if CVS Pharmacy wanted to file a motion for summary judgment before Plaintiff filed her motion for class certification, it was not precluded from doing so." Lauinger Declaration, ¶5. "To date, CVS has not filed a motion for summary judgment in *Kilby v. CVS Pharmacy, Inc.*" *Id.* CVS has thus delayed the *Kilby* action and has chosen instead to file a motion for summary judgment in *Berke*. This certainly smacks of forum shopping, especially in view of failures to comply with Local Rule 40.1(e) of the Southern District and Local Rule 7.1 of this District.

IV.
THIS COURT CAN DISMISS *BERKE* ON THIS RECORD

Counsel for Kilby would respectfully suggest that, on the record before it, the Court may dismiss *Berke* under the first-to-file doctrine without a hearing and without reaching the issue of intervention. The existence of the *Kilby* case, filed fifteen months before *Berke*, is established. Judge Lorenz has long ago addressed a motion to dismiss and there is a detailed scheduling order in *Kilby* by Judge Bencivengo. Numerous depositions have occurred and Kilby is to file her motion for class certification on or before October 3, 2011. Indeed, a pre-certification notice was mailed to many *Kilby* class members months ago. See, Ex. K to the

Declaration of Kevin J. McInerney filed with Kilby's moving papers. The record also establishes that the *Berke* complaint is virtually a carbon copy of *Kilby*,[1] that Berke does not oppose a stay and, in fact, has been attempting to dismiss.

Finally, the Court has been played by CVS's counsel. Local rules of this District and the Southern District were disregarded to allow forum shopping. CVS's counsel doesn't want their client dismissed from the *Berke* action; they want to use this Court for whatever they can. "The purpose of the "first to file" rule is to promote judicial efficiency and should not be taken lightly." *Herman v. Yellowpages*, 2011 U.S. Dist. LEXIS 47676 *6. "Absent compelling circumstances that justify departure from the rule, the first-filing party should be permitted to proceed without concern about a conflicting order being issued in the later-filed action." *Id.* "However, a court may still determine the rule should not be applied based on equitable considerations, such as, where the first action was filed merely as a means of forum shopping or was filed in bad faith." *Id.* See also, *Alltrade, Inc. v. Uniweld Products, Inc.*, (9th Cir. 1991) 946 F.2d 622, 627-28. It is the exceptional case where the first-to-file rule is not honored. The Ninth Circuit made such an exception where the second filed case had proceeded through trial, appeal, and

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[1] Kilby's Proposed Complaint-in-Intervention at Page 3, ¶6, sets forth a class definition that is just as broad as the class definition in *Berke*.[1] More importantly, the statutory class period in *Kilby* is almost three years, whereas the class period in *Berke* is only eighteen months. The *Kilby* Proposed Complaint-in-Intervention also seeks injunctive relief at page 13, ¶32.

remand. *Church of Scientology of California v. United States Dept. of the Army*, (9th Cir. 1980) 611 F.2d 738, 450. But in *Berke*, we hardly have such a scenario. Indeed, the application of the doctrine would free this Court of even addressing summary judgment.

V.
IN ANY EVENT, KILBY MEETS ALL THE CRITERIA FOR INTERVENTION

Defendant argues that that Kilby has "no protectable interest or substantive rights at stake." (Opp., p. 1, lines 22-28 and pages 6, line 19 through page 7, line 6). CVS supports this by lifting out of context a quote in the *Arias* decision in a section where the Supreme Court was addressing a defendant's due process concerns regarding one way intervention. The Labor Code clearly does create a financial interest in the outcome of a PAGA suit. Labor Code §2699(f)(2) provides: "The civil penalty is one hundred dollars ($100) for each aggrieved employee per pay period…" Subsection (i) provides that: "Civil penalties recovered by aggrieved employees shall be distributed… 25% to the aggrieved employees." It is clear, therefore, that PAGA does create a financial stake in which aggrieved employees have an interest. It is also clear that Ms. Kilby's individual claim and the claims of class members she is duty bound to represent are likely to be extinguished by Mr. Berke's improvident complaint if intervention is not permitted. Ms. Kilby is not just some random employee seeking to create mischief via intervention. She filed her action over two years ago, hired counsel experienced in this area of law, has served

her class, and would be remiss in her fiduciary duties if she did not seek to intervene. What really is at stake are not simply the civil penalties of $100 per pay period she can recover, but the millions that the State and other workers may recover.

Contrary to the Opposition's assertion (at page 8:12-24) that Kilby cites only to an allegation of copycatting as evidence of inadequacy, Kilby cited very specific examples. Doc. 25, p. 9:4-10:15. The now apparent willingness of Mr. Berke to dismiss his suit in exchange for a waiver of costs (which cannot be large) is further grounds for allowing intervention, assuming this Court declines the dismiss under the first-to-file doctrine.

With respect to the CVS objection that Ms. Kilby's motion to intervene is somehow untimely, we would simply note that it ill behooves one who disregarded not a local rule, but the local rules of two districts regarding disclosure to raise such a point. At the scheduling conference before this Court on June 20, 2011, did counsel for CVS really think the scheduling of their intended summary judgment motion would have been unaffected had they said, "And by the way, there's this virtually identical case that's been going on in front of Judge Lorenz down in San Diego…"?

Dated: September 2, 2011

Respectfully submitted,
McINERNEY & JONES

s/ Kevin J. McInerney
Kevin J. McInerney